STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL
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October 27, 2009

Office of the Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

RE: **WT DOCKET NO. 08-165** - Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling By CTIA – The Wireless Association – to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance.

Dear Commissioners:

This correspondence is written to reiterate and otherwise underscore the opposition of the Connecticut Siting Council, articulated through our earlier correspondence dated September 24, 2008, relative to the proposal by CTIA – The Wireless Association that the FCC should establish new, nationwide policy that would require all jurisdictions to render decisions with respect to new-build towers within 75 days, as called for under the above-referenced proceeding. A photocopy of that earlier correspondence is enclosed herewith for ease of reference.

Our interest in transmitting this additional letter to you in this matter is sparked by Chairman Julius Genachowski's remarks at the International CTIA Wireless I.T. & Entertainment conference in San Diego, California on October 7, 2009. Chairman Genachowski said that this matter is "ripe for action." He indicated that a decision in this matter would occur in the "near future" and would include a shot-clock.

We write to you today to again stress that if the Federal Communications Commission (FCC) decision in this matter accommodates the policy proposal of CTIA, such new policy would sweep aside a process for tower siting that has worked well in Connecticut for more than 20 years. As explained in our earlier correspondence, the wireless telecommunications industry in Connecticut has come to ably anticipate, accept, and understand that our agency's review and adjudication of such matters takes a predictable period of time. (Conn. Gen. Stat. § 16-50p(a) provides that the Council must render its decision in such matters within 180 days after the filing of an application to a wireless telecommunications facility (tower), a period that may be extended not more than 180 days, and only with the consent of the applicant.) As such, the telecommunications industry in Connecticut has clearly learned to properly schedule their filings in order to facilitate these schedules with no particular hardship to their business interests.

Indeed, Connecticut's model for review of tower siting cases is acknowledged by virtually all concerned parties as being both effective and fair to all concerned. As evidence of this point, I would also call your attention to the letter you received from Connecticut Attorney General Richard Blumenthal, dated September 25, 2008. Mr. Blumenthal cites numerous court cases, both at the federal and state level, that serve to affirm the reasonableness of this state's tower-siting timelines. His letter also persuasively argues that the CTIA proposal runs afoul of the intent of Congress to preserve a "***reasonable period of time***" to review and consider proposals (47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

Clearly, any governmental entity with broad jurisdiction responsibilities must be permitted a sufficient amount of time to undertake its review in a thorough and responsible fashion. Consider, please, that the proceeding under which this very matter is being considered by your own agency (FCC WT Docket No. 08-165) results from a petition filed by CTIA - The Wireless Association on July 11, 2008. There is no specific infrastructure proposal pending before your agency in this matter, thus there are no individual property owners' rights potentially at risk, nor is there any need to undertake any particular review of environmental impact; it is a matter only of the interpretation of existing law. Still, more than 15 months later, your agency continues to consider what the appropriate action might be in this matter.

No doubt this is because your agency properly appreciates the critical need to render important decisions only after collecting input from all concerned persons and deliberating upon the evidence in the record in an open and transparent process. As do we. Frankly, we share your understanding that important decisions affecting the rights of individuals must be adjudicated in a manner that is respectful of the need for notice, due process, and careful deliberation. This is especially true of any agency whose jurisdiction is preemptive and multi-faceted.

Simply put, 75 days is entirely too short a period of time to conduct proper review of new-build tower proposals. In Connecticut, the 180-day time period described above works well and is fair to all concerned. We ask you to heed the call of the many tower-siting jurisdictions, including ours, to not adopt a policy that is both legally dubious relative to the rights of property owners and unworkable for land-use agencies throughout the nation.

Thank you for your consideration.

Very respectfully,

Daniel F. Caruso
Chairman

S. Derek Phelps
Executive Director

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c: Connecticut Attorney General Richard Blumenthal

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Daniel F. Caruso
Chairman

September 24, 2008

Office of the Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

RE: **WT DOCKET NO. 08-165** - Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling By CTIA – The Wireless Association – to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance.

Dear Commissioners:

This correspondence is written in light of CTIA – The Wireless Association (CTIA) seeking a declaratory ruling clarifying provisions of the Communications Act of 1934, as amended, regarding state and local review of wireless facility siting applications. On behalf of the Connecticut Siting Council (Council), an executive-branch agency of Connecticut state government, the undersigned wish to respectfully submit the following comments in opposition to this proposal.

Specifically, CTIA asks the Commission to take four actions:

1. Eliminate the ambiguity of a timely decision suggesting "(1) a failure to act on a wireless facility siting application only involving collocation occurs if there is no final action within 45 days from submission of the request to the local zoning authority; and (2) a failure to act on any other wireless siting facility application occurs if there is no final action within 75 days from submission of the request to the local zoning authority."

2. Implement procedural steps, consistent with Section 332(c)(7)(B)(ii) of the Communications Act, that state and local governments act on wireless facility siting applications within a reasonable time, whereby, if a zoning authority fails to act within the above time frames, the application shall be "deemed granted." Alternatively, CTIA asks the Commission to establish a presumption that entitles an applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay.

3. Clarify that Section 332(c)(7)(B)(i)(II), which forbids state and local decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services,"

bars zoning decisions that have the effect of preventing a specific provider from providing service to a location on the basis of another provider's presence there.

4. That the Commission preempt, under Section 253 of the Communications Act, local ordinances and state laws that automatically require a wireless service provider to obtain a variance before siting facilities.

The Connecticut legislature has charged this agency (rather than the state's local municipalities) with authority to regulate the placement, construction, and modification of personal wireless service facilities. Facilities "operating within a cellular system" are among such facilities. Thus, in the State of Connecticut persons seeking to develop new wireless (cellular) facilities, as referenced by the subject CTIA, are under this agency's jurisdiction rather than the more local jurisdiction of our state's 169 cities and towns. (Of note, Conn. Gen. Stat § 16-50p(a) provides that the Council must render its decision in such matters within 180 days after the filing of an application to a wireless telecommunications facility (tower), a period that may be extended not more than 180 days, and only with the consent of the applicant.)

Rarely, if ever, has the industry expressed dissatisfaction with the Council's schedule for review and adjudication process in these matters and no legislation to otherwise alter this process has been proposed by the industry. Indeed, Connecticut's model for review of these matters is acknowledged by the industry and municipalities alike as having several advantages. Nevertheless, given that all such applications must come before our agency we naturally receive a sizeable number of such applications each year. Over the last five years alone the Council reviewed and acted on more than 90 applications to build new towers and over 800 applications related to tower sharing. The Council denied eight proposals.

This high volume of work has enabled our agency to develop significant subject-matter expertise in the specialized field of wireless communications. We employ several full-time siting analysts with expertise in environmental sciences, land use planning, and siting matters. This means that the Council is an experienced board that is well equipped to reach reasoned, thoughtful decisions that achieve the often difficult goal of balancing the often competing concerns that are inherent to the siting process.

Still, our review of such applications takes some time. As your agency itself knows important decisions affecting the rights of individuals must be adjudicated in a transparent manner that is respectful of the need for notice, due process, and careful deliberation. This is especially true of any agency whose jurisdiction is preemptive and multi-faceted. (Please note that while our agency's jurisdiction exists at the state level and is thus preemptive of some 169 municipalities, we are also charged with siting jurisdiction in areas related to energy infrastructure, hazardous waste, and other areas of public interest and concern.) As a practical matter most applications to approve a tower-sharing request are processed by our agency in four to six weeks. Applications to approve a new-build tower are generally reviewed and acted upon in four to five months given that such applications require a public hearing.

Public hearings, if they are to be meaningful, naturally require significant notice to the affected community in order that persons may be permitted the opportunity to make plans to be in attendance. In any event, the wireless telecommunications industry in Connecticut has come to anticipate, accept, and understand that our agency's review and adjudication of such matters takes

a predictable period of time; as such they have learned to properly schedule their filings in order to facilitate these schedules with no particular hardship to their business. Simply put, while the 45-day and 75-day timelines proposed by CTIA may or may not make sense for jurisdictions that operate at the most local levels of government, such timelines are simply unworkable for an agency with statewide jurisdiction that literally receives dozens of applications each month.

In summary the largely self-serving proposal by CTIA to effectively fast-track siting decisions for wireless telecommunications facilities is highly problematic. It seeks to assign a nationwide remedy where, as the above information demonstrates, no nationwide problem exists. Worse, if enacted as proposed the timelines would effectively vitiate a review process in the State of Connecticut that ably balances local concerns with national policies and federal law. For these reasons we urge that the petition submitted by CTIA – The Wireless Association be denied. Thank you for your consideration.

Very respectfully,

Daniel F. Caruso
Chairman

S. Derek Phelps
Executive Director

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c: Connecticut Attorney General Richard Blumenthal

State of Connecticut

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Hartford
September 25, 2008

Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: WT Docket No. 08-165

Dear Commissioners and Secretary of the Commission:

As the chief legal officer of the State of Connecticut, I am writing in opposition to the petition filed by CTIA -- The Wireless Association (CTIA), docketed as WT Docket No. 08-165. The CTIA's proposal to place arbitrary deadlines on state and local agencies to rule on wireless facility applications would violate the Telecommunications Act of 1996 (the Act) and is unjustified and unnecessary.

The CTIA's petition requests that this Commission interpret provisions of the Act that give state and local agencies a reasonable time to act on a wireless facility application. Specifically, the Act provides that "[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a ***reasonable period of time*** after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added). The CTIA's petition asks this Commission to hold that a failure to act on a wireless facility siting application only involving collocation occurs if there is no final action within 45 days from the submission of the request to the state or local siting authority, and that a failure to act on any other wireless siting facility occurs if there is no final action within 75 days from submission of the request to the state or local siting authority. CTIA further asks that a failure to act shall be deemed to be an approval of the wireless siting request. (CTIA Petition, at 24-27, 38.)

The CTIA's proposal is plainly contrary to the Congress's intent in enacting the Telecommunications Act of 1996 (the Act). If Congress had wanted to impose specific deadlines on state and local siting or zoning agencies, it certainly could have. Instead, it purposely chose to respect state and local governments' exercise of their authority and required only that decisions be made in a reasonable time. This permits state and local agencies to take into consideration factors relevant to their jurisdictions in making these important decisions. To place them in a straightjacket of arbitrary deadlines would clearly distort and undermine Congress's judgment in enacting the reasonable time period requirement. The Commission should not create the deadlines the CTIA

proposes when Congress clearly chose to preserve a degree of flexibility and respect for state and local agencies.

Moreover, the CTIA's proposal would force state and local agencies to make hurried and hasty decisions on facility site applications that often require careful analysis and difficult assessments of environmental impacts and alternatives. Wireless facility siting requires consideration of a wide range of factors, including environmental effects, consistency with local land use regulations, impacts on nearby residential neighborhoods, the ability to minimize tower proliferation and to maximize collocation opportunities, the impairment of visual aesthetics, the mitigation of adverse effects, and the availability of potential alternative sites having fewer adverse effects. The Connecticut Siting Council, the state agency with jurisdiction over wireless facility siting in Connecticut, now has lengthy experience with such decisions -- experience showing that many siting applications require significantly longer periods of time than CTIA proposes. The Siting Council's record demonstrates that such time is vital to evaluate the varied and often conflicting factors and to make sound decisions in the public interest. The CTIA's proposal blithely ignores such experience of state and local agencies. Unconscionably, it would preclude those agencies from responsibly exercising their authority.

Finally, CTIA's request is simply unnecessary. The CTIA cites some extreme examples, most involving two years or more of delay. These extreme examples do not justify violating the intent of Congress or impairing the ability of state and local agencies from making sound siting decisions. Connecticut law, for instance, provides that the Siting Council must act on wireless tower facility applications within one hundred eighty (180) days after the filing of an application with a provision that "such time period may be extended by the council by not more than one hundred eighty days *with the consent of the applicant*." Conn. Gen. Stat. § 16-50p(a)(2) (emphasis added.) Under its statutory mandated process, the Siting Council brings the wireless siting process to local communities through evening hearings held in the municipality where the facility is to be located. Conn. Gen. Stat. § 16-50m (a). Municipal government agencies and other state agencies, as well as abutting landowners, receive notice and can become parties. In addition, environmental groups, neighborhood organizations, and members of the general public can become parties or intervenors. *See* Conn. Gen. Stat. § 16-50g, et seq.; Conn. Gen. Stat. § 4-177a. State judicial review is provided by Conn. Gen. Stat. § 16-50q and Conn. Gen. Stat. § 4-183. These statutory provisions ensure that in Connecticut no application by the wireless industry will languish due to inaction while enabling all stakeholders to participate in the process.

Connecticut's statutory time frames have never been challenged as unreasonable. The industry, at least in Connecticut, is hardly clamoring for shorter time frames that would force the Siting Council to make hasty decisions. Indeed, these time frames, which have existed for well over a decade in Connecticut, have proved to be highly workable and have effectively balanced the industry's interest in reasonably prompt application decisions with the public interest in sound siting decisions consistent with public safety and environmental protection.

Although other states do not follow Connecticut's model and its time frames, the courts are able to interpret the Act to prevent abuse. In *Masterpage Communications, Inc. v. Town of Olive*, 418 F.Supp. 2d 66 (N.D. N.Y. 2005), the Court held that a more than two-year moratorium constituted an unreasonable delay under the Act. *Id.*, at 78. In *Sprint Spectrum L.P. v. Town of Farmington*, 1997 U.S. Dist. LEXIS 15832, 3:97 CV 863(GLG), 1997 WL 631104 (D.Conn. 1997), the Court found illegal under the Act a 270 day moratorium prohibiting the plaintiff from constructing a telecommunications facility, or even submitting an application for approval. Thus, the courts have demonstrated an ability to provide a remedy when local agencies have engaged in unreasonable delay.

Although CTIA is apparently unsatisfied with such time frames, courts have effectively ruled against the unreasonably short periods it seeks. In *SNET Cellular, Inc. v. Angell*, 99 F.Supp. 2d 190 (D.R.I. 2000), the court rejected a claim that a 15-month delay was unreasonable. The court stated that "by requiring action within a reasonable period of time, Congress did not intend to create arbitrary time tables that force local authorities to make hasty and ill-considered decisions." *Id.*, at 198. The court further noted that the legislative history of the Act "makes it clear that 'it is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their request to any but the generally applicable time frames for zoning decision.' H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223." *Id.* Similarly, in *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997), the Court rejected a claim that a county board taking six months to decide the plaintiff's application was unreasonable under the Act. *Id.*, at 746.

Thus, courts have already found that the time frames adopted by Connecticut are reasonable under the Act. The arbitrary deadlines sought by CTIA are far shorter than time frames that courts have consistently concluded are well within the Act's reasonable time period requirement.

For the reasons so stated, the CTIA Petition should be rejected by the Commission.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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